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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

JOSE DECASTRO,

Plaintiff,

vs.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT; STATE OF NEVADA;  
BRANDEN BOURQUE; JASON TORREY;  
C. DINGLE; B. SORENSON; JESSE  
SANDOVAL; OFFICER DOOLITTLE and  
DOES 1 to 50, inclusive,

Defendants.

Case Number:  
2:23-cv-00580-APG-EJY

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION (ECF NO. 64)**

Defendants Las Vegas Metropolitan Police Department ("LVMPD"), Ofc. Torrey, Ofc. Bourque, Ofc. Dingle, Ofc. Sorenson, Ofc. Sandoval and Ofc. Doolittle ("LVMPD Defendants"), by and through their attorneys of record, Marquis Aurbach, hereby file their Opposition to Plaintiff's Motion for Reconsideration (ECF No. 64). This Opposition is made and based upon the attached Memorandum of Points & Authorities, the pleadings and papers on file herein and any oral argument allowed by counsel at the time of hearing.

**MEMORANDUM OF POINTS & AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Jose DeCastro ("DeCastro") has filed a Motion for Reconsideration Under Rule 59(e) (the "Motion," ECF No. 64) regarding this Court's Order Granting in Part Defendants' Motion to Dismiss (the "Order," ECF No. 44). In response to the Order,

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DeCastro has moved to recuse Judge Gordon for “apparent bias” (ECF No. 50) and has now brought the instant Motion, attempting to re-litigate the dismissal of certain claims by arguing that the Court committed clear error or that the Order was manifestly unjust (ECF No. 64). Ultimately, DeCastro has failed to meet his burden on a motion for reconsideration to show clear error or manifest injustice. Accordingly, Defendants request that the Court deny the Motion.

## **II. STATEMENT OF FACTS**

On May 7, 2023, DeCastro filed his First Amended Complaint. (ECF No. 13). Thereafter, on June 1, 2023, Defendants filed a Motion for Partial Dismissal. (ECF No. 27). DeCastro opposed the Motion (ECF No. 27), and Defendants submitted a reply brief in support of the motion (ECF No. 30).

On October 23, 2023, the Court issued the Order, granting in part Defendants’ motion for partial dismissal (ECF No. 44). The Order dismissed only four of DeCastro’s claims with prejudice and without leave to amend: (1) Fourth Amendment unreasonable search and seizure based on the arrest; (2) False imprisonment; (3) Invasion of privacy; and (4) Negligence based on the arrest and search. (ECF No. 44). All other claims were either not dismissed or were dismissed without prejudice, and with leave for DeCastro to amend the claims. *Id.* On November 27, 2023, DeCastro filed his Second Amended Complaint (“SAC”). (ECF No. 61). Now, DeCastro moves for reconsideration of the Order. (ECF NO. 64).

LVMPD Defendants hereby incorporate the Statement of Facts as recited in the Motion to Dismiss and the facts referenced by the Court in the Order. *See* ECF No. 15; *see also* ECF No. 44.

## **III. LEGAL STANDARD**

A motion for reconsideration is an “extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Reconsideration is appropriate where: (1) the district court is presented with newly discovered evidence or committed clear error; (2) the

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1 initial decision was manifestly unjust; or (3) there is an intervening change in controlling  
 2 law. *School Dist. No. 1J. Multnomah Cnty. V. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir.  
 3 1993). “[A]mending a judgment after its entry remains an extraordinary remedy which  
 4 should be used sparingly.” *Allstate Ins. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).  
 5 (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999)) (internal  
 6 quotations omitted). The Motion must set forth some valid reason why the court should  
 7 revisit its prior order, and facts or law of a “strongly convincing nature” in support of  
 8 reversing the prior decision. *Frasure v. United States*, 256 F.Supp.2d 1180, 1183  
 9 (D.Nev.2003). They “should not be granted, absent highly unusual circumstances.” *Kona*  
 10 *Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). It is not appropriate for a  
 11 party to raise a new argument on a motion for reconsideration. *389 Orange Street Partners*  
 12 *v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

13 A motion for reconsideration is properly denied when the movant fails to establish  
 14 any reason justifying relief. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir.1985)  
 15 (holding that a district court properly denied a motion for reconsideration in which the  
 16 plaintiff presented no arguments that were not already raised in his original motion).  
 17 Motions for reconsideration are not “the proper vehicles for rehashing old arguments,”  
 18 *Resolution Trust Corp. v. Holmes*, 846 F.Supp. 1310, 1316 (S.D.Tex.1994) (footnotes  
 19 omitted), and are not “intended to give an unhappy litigant one additional chance to sway  
 20 the judge.” *Durkin v. Taylor*, 444 F.Supp. 879, 889 (E.D.Va.1977).

21 A *pro se* complaint, however inartfully pleaded, must be held to less stringent  
 22 standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94  
 23 (2007). However, “pro se litigants in the ordinary civil case should not be treated more  
 24 favorably than parties with attorneys of record.” *Jacobsen v. Filler*, 790 F.2d 1362, 1364  
 25 (9th Cir.1986).

26 LVMPD Defendants hereby incorporate the Rule 12(b)(6) legal standards and the 42  
 27 U.S.C. §1983 legal standards as recited in the Motion for Partial Dismissal. (ECF No. 15,  
 28 p.5-6).

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10001 Park Run Drive  
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(702) 382-0711 FAX: (702) 382-5816**IV. LEGAL ARGUMENT****A. DECASTRO'S MOTION FOR RECONSIDERATION IS MOOT.**

An amended complaint supersedes the original complaint by operation of law, and the original is thereafter treated as “non-existent.” *See Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) (citation omitted). Consequently, any motion directed to the adequacy of the superseded complaint is moot. *See, e.g., Peters v. Rust Consulting, Inc.*, 2014 WL 10988093, at \*2 (C.D. Cal. Apr. 1, 2014) (motion to dismiss original complaint moot after plaintiff filed an amended complaint); *No Cost Conference, Inc. v. Windstream Commc'ns, Inc.*, 940 F. Supp. 2d 1285, 1297 n.5 (S.D. Cal. Apr. 16, 2013) (same); *Wagner v. Choice Home Lending*, 266 F.R.D. 354, 360 (D. Ariz. 2009) (where motion to dismiss claim and motion for reconsideration of an order dismissing a defendant both pertained to the original complaint, both were moot since the plaintiff had subsequently filed an amended complaint).

Here, because DeCastro's FAC has been superseded by his Second Amended Complaint, his motion for reconsideration of the Court's order finding certain claims within the FAC to be deficient is now moot. In addition, the Order dismissed only four of DeCastro's claims with prejudice and without leave to amend: (1) Fourth Amendment unreasonable search and seizure based on the arrest; (2) False imprisonment; (3) Invasion of privacy; and (4) Negligence based on the arrest and search. (ECF No. 44). Therefore, the only portions of DeCastro's Motion which may not have been mooted by the SAC are those relating to the dismissal of those four claims (the “at-issue claims”).

**B. THE COURT CORRECTLY DETERMINED THAT THE DEFENDANT OFFICERS HAD PROBABLE CAUSE TO ARREST DECASTRO.**

In the Motion, DeCastro argues that the Court erred by finding that Ofc. Bourque had probable cause to arrest DeCastro because the FAC did not directly state that DeCastro was obstructing. (ECF No. 64, 2:19-20). In arguing for reconsideration, DeCastro relies on conclusory allegations from the FAC that Ofc. Bourque only ordered DeCastro to stand back from the traffic stop due to DeCastro's recording of the interaction, and that Ofc. Bourque

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1 wouldn't typically arrest someone for obstruction under the circumstances of the subject  
2 incident. (*Id.* at 2:12-19).

3 As an initial matter, some of DeCastro's arguments, such as his argument that the  
4 obstruction statute was selectively enforced against him, only relates to his First Amendment  
5 retaliation claim. The Court's dismissal without prejudice of the First Amendment  
6 retaliation claim has been mooted by DeCastro's re-assertion of that claim in the SAC. (*Id.*  
7 at 2:12-22, 3:14-17); *see also* ECF No. 61. To the extent that the arguments relate to the  
8 claims dismissed with prejudice and are not moot, DeCastro has failed to establish a reason  
9 justifying relief because he has not cited to any compelling law or fact demonstrating clear  
10 error or manifest injustice, and because these arguments have already been raised in prior  
11 briefing.

12 With respect to probable cause, the Court correctly ruled in the Order that even  
13 taking the FAC's allegations as true, the Defendant officers had probable cause to arrest  
14 DeCastro for obstruction because the FAC made clear that Ofc. Bourque was in the midst of  
15 a police interaction with another member of the public when DeCastro approached the  
16 traffic stop and refused after due notice to back up from the traffic stop. As a result, Ofc.  
17 Bourque had probable cause to believe that DeCastro was hindering, delaying, or  
18 obstructing Bourque in the official discharge of his duties. (ECF No. 44, 7:1-10) (citing Nev.  
19 Rev. Stat. § 197.190). In any event, DeCastro cited to no clearly established law that Ofc.  
20 Bourque could not order him further back from the scene or that any reasonable officer  
21 under the circumstances would know that they would violate the Fourth Amendment if they  
22 arrested DeCastro for refusing to obey Ofc. Bourque's command. (ECF No. 44, 7:11-15).

23 DeCastro's Motion places undue weight on the fact that the FAC did not allege the  
24 legal conclusion that Ofc. Bourque had probable cause to arrest him, nor did the FAC cite to  
25 Nevada's laws surrounding obstruction. (ECF No. 64, p.3-6). Whether DeCastro alleged the  
26 existence of the pertinent Nevada statute is not relevant, as this Court can review the legal  
27 authority of statutes and case law in ruling on a Motion to Dismiss irrespective of a  
28 plaintiff's decision whether to cite applicable statutes or case law in the complaint.

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1 Additionally, the fact that DeCastro did not allege a legal conclusion that probable cause  
2 existed to arrest him is of no import. The relevant inquiry for the Court was whether the  
3 facts as alleged in the FAC, taken in the light most favorable to DeCastro, established the  
4 existence of probable cause. As stated above, the Court correctly determined that the facts  
5 alleged in the FAC established that Ofc. Bourque probable cause to arrest DeCastro for  
6 obstruction.

7 DeCastro further asserts that the Court erred in interpreting the facts because he  
8 never alleged in the FAC that he failed to “back up again” after Ofc. Bourque commanded  
9 him to do so. (ECF No. 64, 4:21-23). However, he did allege as much, even if he did not use  
10 that precise language. (ECF No. 13 at ¶¶22-23). DeCastro also contends that he never  
11 alleged he was too close for Ofc. Bourque to safely do his job. (ECF No. 64, 5:4-7).  
12 However, Nev. Rev. Stat. § 197.190 does not provide that obstruction only occurs when the  
13 individual obstructing is too close for the officer to do his or her job. Further, the FAC did  
14 assert that Ofc. Bourque told DeCastro to back up, and that when DeCastro refused to do so,  
15 Ofc. Bourque told DeCastro had he would arrest him for obstructing. (ECF No. 13 at ¶¶22-  
16 23). Under such facts, even construed in a light most favorable to DeCastro, Ofc. Bourque  
17 had probable cause to believe that DeCastro was hindering, delaying, or obstructing  
18 Bourque in the official discharge of his duties.

19 In sum, DeCastro has not met his burden of providing highly convincing facts or law  
20 to overturn the Court’s Order, and is instead utilizing the Motion to rehash previously  
21 litigated arguments. Because DeCastro has not met his burden to show clear error or  
22 manifest injustice in the Order, and also because the Court correctly determined that  
23 probable cause to arrest DeCastro existed based on the allegations of the FAC, the Court  
24 should deny DeCastro’s request to reconsider the Court’s determination of the existence of  
25 probable cause to arrest DeCastro.

26 **C. THE COURT DID NOT MAKE ANY SUMMARY JUDGMENT**  
27 **RULINGS IN THE PRIOR ORDER.**

28 DeCastro contends that the Court converted Defendants’ Rule 12(b)(6) motion into a

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1 motion for summary judgment without providing DeCastro an opportunity to respond. (ECF  
2 No. 64, p.6-7). Although the Order stated some summary judgment standards at the outset of  
3 its analysis (ECF No. 44, 3:18-4:9), Defendants brought the prior motion for partial  
4 dismissal pursuant to Rule 12(b)(6) and the Court's analysis indicates that it was  
5 adjudicating the motion to dismiss pursuant to federal pleading and Rule 12(b)(6) standards  
6 based on the allegations of the FAC. (*See* ECF No. 44). Accordingly, this grievance misses  
7 the mark as the Court did not summarily adjudicate any of DeCastro's claims.

8 **D. THE COURT CORRECTLY DETERMINED THAT THE**  
9 **DEFENDANT OFFICERS ARE PROTECTED BY QUALIFIED**  
10 **IMMUNITY FOR ARRESTING DECASTRO.**

11 DeCastro next contends that the Court erred in making a determination on whether  
12 the Defendant officers are protected by qualified immunity on DeCastro's constitutional  
13 claims grounded in false arrest, both because he believes the Court reached the wrong  
14 outcome and because he asserts qualified immunity should not be determined at the  
15 dismissal stage. (*See* ECF No. 64, p.7-8).

16 However, as noted in the motion for partial dismissal and the Order, because  
17 qualified immunity is "an immunity from suit rather than a mere defense to liability," the  
18 Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions  
19 at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)  
20 (quotation and emphasis omitted). Consequently, qualified immunity can be resolved at the  
21 motion to dismiss stage if it can be determined, "based on the complaint itself, that qualified  
22 immunity applies." *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016). Here, the Court was  
23 able to ascertain based on the allegations in the FAC that the Defendant officers had  
24 probable cause to arrest DeCastro, and thus did not violate his constitutional rights by  
25 arresting and searching him. As a result, the Defendant officers are protected by qualified  
26 immunity. Further, DeCastro pointed to no clearly established law that Ofc. Bourque could  
27 not order him further back from the traffic stop or that any reasonable officer would know  
28 that doing so, or effectuating an arrest for DeCastro's failure to comply with that order,  
would violate DeCastro's Fourth Amendment rights.



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1 Thus, the Court correctly determined that qualified immunity on DeCastro's Fourth  
2 Amendment seizure claim based on his arrest could be determined at the motion to dismiss  
3 stage. DeCastro has not met his burden of providing highly convincing facts or law to  
4 overturn the Court's Order, and is instead utilizing the Motion to rehash previously litigated  
5 arguments.

6 **E. THOUGH *PRO SE*, THIS COURT IS UNDER NO OBLIGATION TO**  
7 **TREAT DECASTRO MORE FAVORABLY THAN ANY OTHER**  
8 **LITIGANT.**

9 DeCastro further argues that the Court erred in dismissing claims because DeCastro  
10 is *pro se*, and because the Court pointed to factual allegations in the FAC in determining that  
11 the pleading could not be cured by the allegation of additional facts. In making these  
12 arguments, DeCastro misunderstands the applicable standard for when dismissal with  
13 prejudice is appropriate.

14 As a *pro se* litigant in a civil case, DeCastro should not be treated more favorably  
15 than parties with attorneys of record. *See Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th  
16 Cir.1986). The at-issue claims were not dismissed with prejudice because DeCastro's FAC  
17 was inartfully pleaded or because DeCastro failed to name the proper parties, but rather  
18 because the factual allegations pled by DeCastro with particularity demonstrated that  
19 probable cause existed for DeCastro's arrest. Therefore, the at-issue claims failed as a matter  
20 of law and could not be cured by amendment.

21 Next, DeCastro's arguments regarding dismissal with prejudice misstate the  
22 applicable standards. The question for the Court is not whether the claim "would fail  
23 regardless of facts," as any claim could succeed with an ideal set of facts. (*See* ECF No. 64,  
24 8:17-21). The appropriate question is whether the allegation of new, additional facts could  
25 cure the deficiency in the pleading. Under that standard, the Court properly dismissed the at-  
26 issue claims with prejudice because no additional facts would change the fact that the  
27 Defendant officers had probable cause to arrest DeCastro for obstruction based on the  
28 factual allegations contained in ¶¶20-26 of the FAC. As a result, the at-issue claims failed as  
a matter of law and could not be cured by additional allegations.



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1           **F.       THE MOTION MISSTATES THE SCOPE OF THE COURT'S**  
2           **DISCRETIONARY IMMUNITY DETERMINATION.**

3           DeCastro further contends that the Court erred by finding that Ofc. Bourque had  
4 discretionary immunity under state law, and cites to cases establishing that decisions  
5 regarding the amount of force to use are not protected by discretionary-function immunity  
6 and cases stating that acts taken in violation of the Constitution are not discretionary. (ECF  
7 No. 64, p.8-9).

8           The Court did not make a blanket determination that Ofc. Bourque had discretionary  
9 immunity for all state law claims, only for DeCastro's false arrest and negligence based on  
10 the arrest and search claims. (*See* ECF No. 44, p.13-14). The cases cited by DeCastro  
11 regarding the amount of force used are not pertinent to whether the officers had  
12 discretionary-function immunity for arresting and searching DeCastro because excessive  
13 force is a distinct issue not broached in the prior motion for partial dismissal or the Order.  
14 (ECF No. 44, 9:1-6). Moreover, the Court correctly determined based on the allegations of  
15 the FAC that probable cause to arrest DeCastro existed. Therefore, the Defendant officers'  
16 arrest of DeCastro was not an act taken in violation of the Constitution.

17           DeCastro has not met his burden of providing highly convincing facts or law  
18 demonstrating that the portion of the Order dealing with discretionary immunity on  
19 DeCastro's state law claims was clear error or manifestly unjust.

20           **V.       CONCLUSION**

21           DeCastro's Motion does not demonstrate that the extraordinary remedy of  
22 reconsideration is appropriate here. The Order does not contain clear error or manifest  
23 injustice, nor does the Motion set forth a valid reason why the Court should revisit and  
24 reverse its prior decision. Rather, the Motion attempts to relitigate previously identified  
25 arguments that have already been considered and rejected by the Court.

26           ///

27           ///

28

1 Accordingly, Defendants request that the Court DENY DeCastro's Motion for  
2 Reconsideration.

3 Dated this 18<sup>th</sup> day of December, 2023.

4 MARQUIS AURBACH

5 By /s/ Craig R. Anderson

6 Craig R. Anderson, Esq.  
7 Nevada Bar No. 6882  
8 10001 Park Run Drive  
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10 Attorneys for Defendants

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that I electronically filed the foregoing **DEFENDANTS'**  
13 **OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION (ECF NO.**  
14 **64)** with the Clerk of the Court for the United States District Court by using the court's  
15 CM/ECF system on the 18<sup>th</sup> day of December, 2023.

16 ☐ I further certify that all participants in the case are registered CM/ECF users  
17 and that service will be accomplished by the CM/ECF system.

18 ☒ I further certify that some of the participants in the case are not registered  
19 CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid,  
20 or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days  
21 to the following non-CM/ECF participants:

22 Jose DeCastro  
23 4616 W. Sahara Ave., Ste. 1, Box 271  
24 Las Vegas, NV 89102-3654  
25 Plaintiff Pro Se

26 /s/ Sherri Mong

27 an employee of Marquis Aurbach  
28

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